No. 77-1553

In the Supreme Court of the United States

OCTOBER TERM, 1978

COUNTY OF LOS ANGELES, ET AL., PETITIONERS

v.

VAN DAVIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

In our view, the questions framed by petitioners are not properly presented in this case and the writ of certiorari ought to be dismissed as improvidently granted. Shortly stated, those questions are:

1. Whether the use of arbitrary employment criteria which are racially exclusionary in operation,

although not purposefully discriminatory, violates 42 U.S.C. 1981.

2. Whether the imposition of minimum hiring quotas for minority applicants, provided they are fully qualified for the job, is an appropriate remedy in this employment discrimination case.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case, although brought by private plaintiffs, is said to present questions concerning Title VII of the Civil Rights Act of 1964 and its relationship to 42 U.S.C. 1981, as well as the appropriate remedies for violation of both statutes. There is, of course, a direct federal responsibility for enforcement of Title VII, assigned by Congress to the Equal Employment Opportunity Commission, the Department of Justice, and the Civil Service Commission. The United States also has an interest in the correct construction and effective operation of Section 1981. For that reason, we have participated as *amicus curiae* in previous cases in this Court involving Section 1981 and the companion statute, Section 1982. See, *e.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Runyon* v. *McCrary*, 427 U.S. 160 (1976). The same considerations suggest our speaking here.

STATEMENT

1. This class action was filed on January 11, 1973, by black and Mexican-American incumbent

Los Angeles County firemen and applicants, alleging hiring discrimination in violation of 42 U.S.C. 1981, 42 U.S.C. 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. (and Supp. V) 2000e *et seq.*[1] The union representing incumbent firemen was allowed to intervene. The plaintiffs requested, and the district court ordered, that the plaintiff class be defined to consist of present and future black and Mexican-American applicants to, and employees of, the fire department. The class was not defined to include past applicants (A. 41, 83).

At the time the complaint was filed in January 1973, the fire department consisted of 1972 firemen, of whom 0.5% (nine) were black and 2.8% (50) were Mexican-American (A. 38-39). The proportion of blacks and Mexican-Americans in the County population at the time was 10.8% and 18.3%, respectively (A. 39).[2] Evidence in the record established that applicants for the entry level position of fireman have traditionally been required to take a written test as part of the application procedure (A. 21). Applicants with the highest scores were then given

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[1] The original complaint did not allege a violation of Title VII. However, Title VII was invoked in plaintiffs' second amended complaint (A. 1-10), to which was attached the Equal Employment Opportunity Commission charge filed by plaintiffs and a "right to sue" letter issued by the Department of Justice.

[2] In contrast to the small number of blacks and Mexican-Americans in the fire department, 60% of the County positions paying less than that of fireman were filled by blacks and Mexican-Americans (Tr. 54, 69).

a physical agility test and an oral interview.[3] These three elements of the examination process were assigned weights and a total score was computed for each applicant. Those not eliminated were then placed on an eligibility list and selected in rank order as vacancies occurred (A. 101).

Minority group applicants have done extremely poor on the County's written tests. The parties stipulated that in 1969, 1424 applicants sat for the written test (*id.* at 21-22). Of these, 17% (244) were black, 8.1% (100) were Mexican-American, and 75.8% (1080) were white (*ibid.*). Of the 407 applicants called for interviews following the written and physical agility tests, 4.5% (19) were black and 3.4% (14) were Mexican-American (A. 23). Thus, 35% (383) of the whites who took the written test passed it, whereas only 7% of the black and 14% of the Mexican-American applicants did so (*id.* at 27).

Although the County was aware as early as 1969 that its written tests had an adverse impact upon minority applicants (Tr. 42-43), it administered a similar test in January 1972. The County originally had planned to use the test solely to eliminate functional illiterates from consideration (about two percent of those taking the test).[4] The County had determined

[3] There was no evidence that either the physical agility test or the oral interview had a discriminatory impact on minority applicants (see, *e.g.*, A. 24).

[4] The test was administered to 2414 applicants. Of these, 1904 (78.9%) were white, 196 (8.1%) were black and 283

to select approximately 500 of the remaining applicants by lot for oral interviews (Tr. 65; A. 102-103). This procedure would have "eliminated the written test as a ranking device" and would have given "every passing applicant an equal opportunity to be chosen for an oral interview" (A. 103). Before the lottery system could be implemented, however, a suit was brought in state court to enjoin that procedure on the ground that it would violate provisions of the County charter and civil service regulations (*ibid.*). The state court preliminarily enjoined the use of the random selection procedure pending a trial on the merits (*ibid.*).

In December 1972, while the state court injunction was still in effect, the County determined that it would interview applicants who had received the top 544 scores on the 1972 written test in order to fill the increasing number of vacancies (*ibid.*). Of the top 544 applicants, 90.4% (492) were white, 1.8% (10) were black, 6.0% (33) were Mexican-American, and the remainder were "other races" (A. 24). The County did not implement that plan either, however. Upon hearing that the present suit was to be brought, the County abandoned its proposal in early January 1973, and instead interviewed all but the lowest scoring 3.1% of the applicants (A. 24-25).[5]

(11.7%) were Mexican-American (A. 24). The remaining 31 applicants were evidently of other races. Those who passed were: 1,885 whites, 170 blacks and all 283 Mexican-Americans (A. 24, 103).

[5] Although a stipulation refers to January 1972 as the time when interviews were commenced and the plan to limit those

The resulting rankings had no adverse impact on blacks or Mexican-Americans (A. 25). On the contrary, some 31% of those at the top of the new eligibility list belonged to these minorities (*ibid.*) and half of those actually hired in the Spring of 1973 were blacks or Mexican-Americans (see A. 6; Pet. Br. at 8-9).

It was stipulated that the written entrance examination used by the County had not been validated as predictive of job performance (A. 23), and at trial the County's personnel director testified that in his judgment the tests were almost useless except to eliminate functional illiterates (Tr. 79). Plaintiffs' testing expert confirmed the personnel director's assessment of the written tests (Tr. 207-208).[6]

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interviews to the top 544 was abandoned (A. 24), this is obviously an error (see A. 105 n.2). It is clear that interviews of *all* applicants not shown to be illiterates commenced in January 1973 (A. 25, 91 n.14, 104), and, presumably, the decision to follow that procedure immediately preceded. Moreover, it was expressly found that the previous plan to interview only the top 544 applicants was abandoned only when petitioners learned "that this law suit was about to commence" (A. 39, 91 n.14); the present suit was filed on January 11, 1973; and this would jibe with a date of January 8, 1973 (see A. 25; Tr. 48-49).

[6] Evidence was also introduced regarding the impact of the County's minimum height requirement. Until 1971, the county had a minimum height requirement of 5'8" for firemen (A. 24). In 1971 that requirement was lowered to 5'7". The parties stipulated that a study had been done which showed that 41% of all male Mexican-Americans and only 14% of all male Caucasians in Los Angeles County were shorter than 5'7" (Tr. 200). Despite this adverse impact, the County had never attempted to validate the minimum height requirement (A. 28).

2. Assessing this evidence, the district court found that petitioners had not acted "with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department" (A. 41). Nevertheless, the court concluded that they "did intentionally engage in employment practices which had the effect of discriminating against" these minorities (A. 42; see also A. 41). The violations were specified (A. 39):

> (a) [u]tilizing, until learning that this lawsuit was about to commence, written tests as a selection device for entry level positions at the Los Angeles County Fire Department, although such tests had a disproportionate detrimental impact upon black and Mexican-American applicants, and despite the fact that such tests have not been shown by a validation study to be related to or predictive of job performance statistically.

And

> (b) [f]ailing and refusing to take necessary affirmative steps to overcome the existence in the black and Mexican-American communities of Los Angeles County of a reputation that the Los Angeles County Fire Department discriminates against blacks and Mexican-Americans.

The 5'7" height requirement, on the other hand, was found to be "substantially and reasonably related to job performance as a fireman" (A. 39).

The judgment of the district court permanently enjoined the defendants from discriminating against

blacks and Mexican-Americans and ordered that (A. 46):

> 3. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be blacks until such time as the percentage of blacks in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of blacks in the general population of Los Angeles County.
>
> 4. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be Mexican-Americans until such time as the percentage of Mexican-Americans in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of Mexican-Americans in the general population of Los Angeles County.

But the court expressly added (A. 47):

> Nothing in this Order shall in any way be deemed to require or encourage Defendants: (a) to employ any person not qualified for a fireman position with the Los Angeles County Fire Department; or (b) to in any way lower or refrain from increasing the standards for employment as firemen at the Los Angeles County Fire Department, provided such standards are reasonably related to the qualifications of potential firemen; all other provisions in this order are subordinate to the provisions of this paragraph

> * * * and shall be subject to modification in the event of any conflict herewith.

3. The court of appeals affirmed in part, reversed in part and remanded the case for further consideration.[7] The court held that "[i]n light of the fact that plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the 1969 examination," and therefore concluded that "plaintiffs lacked standing to challenge defendants' prior use of the test in 1969" (A. 83). However, the court of appeals affirmed the district court's holding that the County's plan to rank applicants based upon the 1972 written entrance examination and to interview only those with the top 500 scores was unlawful because it would have had an adverse impact on blacks and Mexican-Americans and was not job related (A. 84-91). Although the County had not hired anyone on the basis of the discriminatory examination, and had discontinued use of the examination except to screen out illiterates after it had been informed that this suit was to be filed, the threat to use the examination persisted (A. 91 & n.14; see also A. 105 & n.2, Wallace, J.).[8]

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[7] The court of appeals issued two opinions (A. 52-78, A. 79-119), the latter on defendants' motion for rehearing. Unless otherwise noted, references are to the court's second opinion.

[8] The only discriminatory act—the threatened discriminatory use of the 1972 test—that the court of appeals found plaintiffs to have standing to challenge therefore occurred after the effective date of Title VII (see pages 14-15, *infra*).

The court ruled that the 1972 test, as it was intended to be used by the County, violated 42 U.S.C. 1981 as well as Title VII (A. 90-91 & n.14). It held that in employment discrimination suits, the standards announced in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), apply to Section 1981 because the courts of appeals had uniformly "employed Title VII principles as a benchmark" in such suits (A. 88). The court distinguished *Washington* v. *Davis*, 426 U.S. 229 (1976), in which this Court ruled that evidence of discriminatory purpose is necessary to establish violations of the Fifth and Fourteenth Amendments.

The court of appeals reversed the district court's finding as to the minimum height requirement, holding that the testimony upon which the district court relied "falls far short of validating" the height requirement under the standards of *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (A. 92). The court concluded that this requirement violated both Title VII and Section 1981 (A. 92 n.15).

With regard to the relief ordered by the district court, the court of appeals approved, as a general matter, of hiring quotas as remedies "to erase the effects of past discrimination" (A. 95). However, the court did not affirm the district court's order, holding that (A. 96):

> The court * * * should reconsider its order in light of our decision that the 5′7″ height requirement is invalid and that plaintiffs lacked standing to challenge defendants' use of the 1969 written examination.

Judge Wallace dissented. He agreed with three parts of the majority's opinion: that plaintiffs lacked standing to challenge pre-1972 actions of the County (A. 99); that the County's continued threat to use the fireman's test in a discriminatory manner constituted a violation of Title VII (A. 105); and that *Washington* v. *Davis*, *supra*, "does not address the question of whether cases brought under section 1981 * * * always require proof of discriminatory intent * * *" (A. 107). However, the dissent disagreed with the majority's other conclusions. Having determined that the only violations at issue occurred after the effective date of Title VII, and that the County had violated Title VII, Judge Wallace thought it unnecessary to examine whether the County had also violated Section 1981 (A. 105-106). He argued, however, that, "[b]ecause section 1981 is peculiarly linked to the Fourteenth Amendment, the standards pertaining to that amendment should also control section 1981" (A. 109). The dissenting judge also stated his view that hiring quota relief was inappropriate in this case. Noting that racial imbalance in the fire department was neither aggravated nor perpetuated by the 1972 examination, he argued that the "limited threat of discrimination" which the examination represented "does not create a proper platform from which to reach back to correct the racial imbalance" (A. 118, footnote omitted). The dissent concluded that the district court could fashion an effective order prohibiting the use of the 1972 examination "without imposing quotas" (A. 119).

DISCUSSION

Our submission is that the writ of certiorari issued in the case should be dismissed as improvidently granted. A careful review of the record persuades us that the issues framed by petitioners are not properly presented and that, in the circumstances, the Court will wish to dismiss the writ in accordance with its usual practice. See, *e.g.*, *Belcher* v. *Stengel*, 429 U.S. 118 (1976); *McClanahan* v. *Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971); *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1917); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), and cases collected at 78-79 n.2.

Of course, deference to the Court, as well as a natural diffidence about prejudicing the course of litigation in which we are not parties, makes us reluctant to suggest that certiorari was improvidently granted. But this is not an ordinary private lawsuit. As we have noted (*supra*, page 2), the questions raised by the petition are of immediate interest to the government and implicate public rights of vital importance to minorities throughout the Nation. Those considerations, we believe, make our participation in the case appropriate. Yet, if we are to speak at all, our duty to the Court requires disclosure of the obstacles which, in our view, inhibit review here. Cf. *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.12, 390-391 (1975). The task falls to us because neither the petition nor the brief in opposition, nor petitioners' brief, suggests any doubt whether the questions said to be presented are properly in the case. Cf. Brief

for the United States as *amicus curiae* in *Belcher* v. *Stengel*, No. 75-823.

It may be that its procedural history had obscured the posture of the case as it reached this Court. The district court premised its remedial order—which included minimum hiring quotas (A. 46, 48-50)—primarily on a finding of discrimination occurring before Title VII became applicable to state public employers in March 1972 (A. 38, 41-43). Accordingly, reliance on 42 U.S.C. 1981 was necessary and both the questions now said to be presented were in the case when it came to the court of appeals. Initially, that court affirmed in all respects, except only that, contrary to the district court, it held the height limitation illegal (A. 52-66). At that stage, the court of appeals expressly based its judgment on the assumption that all actionable conduct, and relevant effects, occurred before March 24, 1972, and were therefore reachable only under Section 1981 (A. 56-57). Thus, until that opinion was withdrawn, the issues presented by petitioners remained. But the court of appeals granted rehearing, and, as we elaborate in a moment, the new opinion and judgment reached very different conclusions as to *when* actionable discrimination occurred and what *remedy* might be appropriate. The upshot is that issues once at the heart of the case are no longer present.

1. The first question said to be presented is whether Section 1981, like Title VII, reaches conduct which is not purposefully discriminatory but has a disparate adverse impact on racial minorities. At

least in a case like this one, that issue is wholly academic with respect to any period during which Title VII was in effect—here beginning March 24, 1972. To be sure, the applicability of Title VII does not foreclose a claim under Section 1981. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460-461 (1975); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). But, if Title VII plainly covers the whole case and affords all possible relief, the Section 1981 claim is mere surplusage. In that situation, it may be questioned whether any court ought to reach out to decide a novel and difficult question under the more general statute. In any event, however, this Court will not normally review the alternative holding when it has no effect on the judgment. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). And, although certiorari has already been granted, the writ usually will be dismissed. See, *e.g.*, *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 465 n.5 (1962).

Those principles govern here. Both courts below have held that petitioners' conduct violated Title VII. Although that ruling is now questioned (Pet. Br. at 48-51), it was not challenged by the petition for certiorari, and, accordingly, the issue is not before the Court. *E.g.*, *Jones* v. *Hildebrant*, 432 U.S. 183 (1977). As it happens, the conduct found violative of Title VII was, according to the final decision of the court of appeals, the only actionable conduct reachable in this suit. That was the consequence of

the holding, on rehearing, that the plaintiff class was unaffected by, and therefore lacked standing to complain about, the use of the 1969 written test or, indeed, any other acts of petitioners before late 1972 (A. 81-83)—by which time Title VII was in effect. Since there is no reason to believe that the nature of the relief would be affected, in this case, by remedies available under Section 1981 but not Title VII, the court's discussion of Section 1981 was, as the dissent noted (A. 105-106), "wholly unnecessary." The upshot is that the judgment below rests on an independent ground not open in this Court and that a decision on the Section 1981 issue will have no effect on the case.

2. Somewhat different considerations counsel against this Court's now deciding the other question said to be presented. Essentially, the quota hiring order is not final and accordingly is not ripe for review here.

In its initial decision, the court of appeals approved the district court's imposition of minimum quotas and remanded the case only "for reconsideration of the proper ratio of accelerated racial hiring to be ordered" in light of the holding that the 5'7" height requirement for firemen was unlawful (A. 53-54; see, also, A. 65-66). Presumably, this disposition would have left open only the question whether the quota for Mexican-Americans should be *increased*. But see pages 19-20, *infra*. Had that remained the judgment of the court below, it would indeed have presented the issue whether a "catch up" quota was appropriate relief in the circumstances. But here, also, the court's

decision on rehearing was substantially different. Although most of the broad language of the first opinion approving affirmative relief (A. 61-66) is reproduced in the second (A. 92-97), there is a critical distinction: under the final judgment, the district court on remand must reconsider its remedial order, not only because of the ruling invalidating the height limitation, but also "in light of [the appellate court's holding] * * * that plaintiffs lacked standing to challenge defendants' use of the 1969 written examination" (A. 96).

This may well require the district court to withdraw its order mandating accelerated quotas and to substitute a lesser remedy, perhaps including no quota provision. At the least, the question of the appropriate relief is re-opened, since "the scope of the remedy is determined by the nature and extent of the * * * violation." *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); see *Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).[9] In sum, the

[9] It is clear, of course, that minimum hiring quotas may be ordered in an appropriate case. The 1972 amendments to Title VII, which apply here, added to Section 706(g), 42 U.S.C. (Supp. V) 2000e-5(g), authority to award "any other equitable relief as the court deems appropriate." That language must be read against congressional rejection of proposed amendments that would have barred hiring ratios (118 Cong. Rec. 1676, 4918 (1972)) and the express defense of two decisions approving such relief by Senators Javits and Williams, the principal spokesman against the limiting proposals. *Id.* at 1662-1676, 4917-4918. This is, moreover, the unanimous conclusion of the eight courts of appeals that have considered the question. See A. 94-95.

ultimate result is not yet known, even in broad outline, and, in these circumstances, this Court would normally decline premature review. See, *e.g.*, *Firemen* v. *Bangor & A. R. Co.*, 389 U.S. 327 (1967).

3. What has been said sufficiently indicates that, given the failure of the petition for certiorari to challenge the Title VII ruling of both lower courts, this Court's intervention in the case is likely to result in no more than an advisory opinion. It need hardly be said that this is a role the Court has steadfastly eschewed. But there is yet a further reason for declining review: the staleness of the case.

The primary group among the remaining plaintiffs and the class they represent[10] are blacks and Mexican-Americans who applied for openings as firemen six years ago, in late 1971 (A. 3, 20, 21, 25, 68, 83). They were required to take a written test in January 1972, which, at the time, was intended only to screen out functional illiterates (A. 3, 24, 71-72, 102-103). Between some date in late 1972 and January 8, 1973, petitioners impermissibly threatened to use the test results as a basis for ranking applicants (A. 24-25; *supra*, note 5). But, on the latter date, that plan was abandoned and petitioners have not engaged in any

[10] Some of the original plaintiffs were incumbent firemen and a class of incumbent blacks and Mexican-Americans was listed as claimants (A. 3). This was presumably because discrimination in promotion, as well as hiring, was alleged (A. 4-5, 8-9). That claim, however, was not sustained, if, indeed, it was pressed (see A. 38-43). It follows that the only "live" plaintiffs are rejected applicants who initially applied in 1971 and those who applied subsequently.

discriminatory practice since. Indeed, although the potential existed for a short period, no one (including the plaintiffs) has actually suffered discriminatory treatment since the plaintiffs became applicants in October 1971 (A. 83). And it is apparently unchallenged that the County's hiring record in the last five and a half years has been exemplary (Pet. Br. at 10).

We do not suggest that the district court's order was entered improvidently. On the contrary, since petitioners abandoned their unlawful plan only when the present suit was imminent (A. 39, 91, 105), the court was, in our view, fully justified in enjoining a "return to [the] old ways." See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953). But that was more than five years ago, in July 1973 (A. 45; Pet. Br. at 3). In the meanwhile, we are told, some 207 black or Mexican-American firemen have been hired, constituting more than 50% of the new recruits taken on in the five-year period (Pet. Br. at 10). Presumably, the plaintiff minorities now together account for some 12.6% of the total force of the Los Angeles County Fire Department.[11] Although this is far from the 29% of the County population represented by blacks and Mexican-Americans, it is a radical improvement over the 3.3% minority membership in January 1973 when this suit was filed.

[11] This figure assumes that the total number remains 1,762 (see A. 39; but see A. 11, 19-20; Pet. Br. at 3) and that blacks and Mexican-Americans have left the force at the same rate as others. On that basis, some 12 of the original 59 minority firemen (A. 20) would have left, and, adding the 207 new recruits to the remaining 47, we reach a total of 254.

In light of this experience, it may be that the district court today would appraise differently the need for rigid remedial quotas. For all we know, the district court may properly take the view that what seemed reluctant acquiescence in 1973 has, five years later, given way to good faith compliance with the law. Since the court of appeals has remanded the case to reconsider questions of remedy, it would seem inappropriate for this Court to adjudge the matter on a stale record when changed circumstances might persuade the district court to withdraw or alter its order in significant respects. Cf. *Calhoun* v. *Latimer*, 377 U.S. 263 (1964).

4. Finally, there is one aspect of the case which is not sufficiently fleshed out to permit intelligent review by this Court at the present time. We refer to the holding of the court of appeals invalidating the 5′7″ height requirement. Although that ruling is now final, not having been challenged by the petition for certiorari insofar as it rests on Title VII (see A. 91-92 & n.15), it presumably affects the remedial order that ultimately must be entered (see A. 80-81, 96). Yet, the record before this Court reveals almost nothing about the past and present impact of that requirement.

To be sure, the district court noted the parties' stipulation that the 5′7″ height rule "eliminate[d] from consideration approximately 41% of the Mexican-American male population" (A. 40). But, con-

cluding that the requirement was valid (A. 39, 40, 42), the court did not pursue the matter, merely reducing the Mexican-American quota to reflect the ineligibility of a large portion of that population (A. 40, 80-81). The court of appeals, although reversing on this issue (A. 91-92), expressly left open on remand how its ruling should affect a remedial order (A. 81, 96). Nor is the solution obvious. Among other difficulties confronting the district court will be how to adjust the quotas, if quotas are retained, to reflect the newly eligible shorter Mexican-Americans without prejudicing the plaintiffs, or at least the black plaintiffs; and, if quotas are eliminated, how to identify and make whole the victims of this discriminatory requirement. See A. 100-101. Plainly, these are not matters for initial decision by this Court, without benefit of an adequate factual record or rulings by the lower courts.

5. For the several reasons just articulated, we submit that this case is a wholly inappropriate vehicle for decision of far reaching questions that may govern much other litigation. Presumably, the issues will come before the Court in a proper case in due course.[12] But, at all events, we urge the Court to decline the present invitation. It is not apparent why petitioners have sought to obtain review of a first question that cannot affect the judgment and a second that is not

[12] For the reasons given in our brief in opposition to that pending petition, we do not believe *Johnson* v. *Alexander*, No. 78-5180 is such a case. *Johnson* v. *Ryder Truck Lines, Inc.*, petition pending, No. 78-179, presents a somewhat different question, albeit, in defending the judgment, respondents may raise the Section 1981 issue sought to be presented here.

ripe and may well disappear after remand, on a record that is in part stale and in another part incomplete. Whatever their motives, however, this Court cannot be expected to waive its salutary rules of practice to resolve points of law of general interest but not properly presented in the case. In all the circumstances, the right course, we believe, is to dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be dismissed as improvidently granted.

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